IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

Writ Petition No.401 of 2007

1. Deputy Director,
   Sports and Youth Services,
   Nagpur Division, Nagpur.

2. Commanding Officer,
   2 Maharashtra Medical Colony,
   National Cadet Corps,
   Government Medical College Building,
   Nagpur. ... Petitioners

Versus

T.A. Banerjee,
aged about Major,
Occu.: presently Nil,
R/o Qr.No.RE/RB-IV/2 AD,
Behind Railway Quarters,
Ravi Nagar, Nagpur. ... Respondent
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Shri A.M. Deshpande, AGP for Petitioners.
Shri J.L. Bhoot, Advocate for Respondent.

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Coram : R.C. Chavan, J.
Dated : 3rd December, 2007

Oral Order :

1. It is unfortunate that the State has chosen to challenge the

order passed by the learned Judge, Industrial Court, Nagpur, granting 100 per cent back wages instead of 50 per cent back wages granted by the Labour Court.

2. The respondent-employee was a permanent Peon working with petitioner No.1 since April 1987. On 11-5-1994, an officer of the petitioner-Department gave a cheque to the respondent for being encashed in the Bank. While bringing the cash from the Bank, the respondent's pocket was picked and, therefore, he could not hand over a sum of Rs.1,000/-, which was withdrawn. He was placed under suspension and eventually was dismissed on 28-11-1994 without conducting any enquiry. On 29-5-2005, he challenged his dismissal before the Labour Court, which held by judgment dated 18-5-2001, that dismissal of the respondent without holding a domestic enquiry amounted to unfair labour practice. The learned Judge of the Labour Court directed reinstatement of respondent but with only 50 per cent back wages. The petitioner-Department did not prefer any further proceedings against this order. The respondent-employee, however, approached the Industrial Court, which passed the impugned order on 29-6-2006 granting 100 per cent back wages to the employee. Aggrieved thereby, the State has preferred the

present petition.

3. I have heard Shri A.M. Deshpande, learned AGP for the petitioners, and Shri J.L. Bhoot, learned Advocate for the respondent-employee. Forceful submissions of the learned AGP and his request that they may be dealt with have necessitated passing this elaborate order.

4. The learned AGP for the petitioners forcefully urged that the learned Member, Industrial Court, could not have granted full back wages in the absence of pleading and proof that the respondent-employee was not gainfully employed during the period of termination and, therefore, wanted the order to be set aside. For this purpose, he placed reliance on the three judgments of the Supreme Court, viz. (i) Allahabad Jal Sansthan v. Daya Shankar Rai and another, reported at (2005) 5 SCC 124; (ii) U.P. State Brassware Corpn. Ltd. and another v. Uday Narain Pandey, reported at (2006) 1 SCC 479; and (iii) J.K. Synthetics Ltd. K.P. Agrawal and another, reported at (2007) 2 SCC 433.

5. In Allahabad Jal Sansthan v. Daya Shankar Rai and another, reported at (2005) 5 SCC 124, the Court was considering case of an

employee appointed purely on temporary basis on 14-10-1985, whose services were liable to be terminated without any prior notice. His services were accordingly terminated on 24-1-1987. The employee approached the Labour Court, contending that though he had worked for more than 240 days in a calendar year, his services had been wrongfully terminated. The Labour Court ordered reinstatement of the employee with full back wages. A writ petition by Allahabad Jal Sansthan questioning the said award was dismissed. The Apex Court granted leave to appeal confining to the question of back wages. The observations of the Court in paras 6, 11, 14 and 16, which are reproduced below, were pressed in aid by the learned AGP for the petitioners, to support his contentions.

> *"6. A law in absolute terms cannot be laid down as to in which cases, and under what circumstances, full back wages can be granted or denied. The Labour Court and/or Industrial Tribunal before which industrial dispute has been raised, would be entitled to grant the relief having regard to the facts and circumstances of each case. For the said purpose, several factors are required to be taken into consideration."*
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> *"11. In Haryana State Coop. Land Development Bank v. Neelam it was held: (SCC pp. 98-99, para 18)*
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> *"18. It is trite that the courts and tribunals having*

> *plenary jurisdiction have discretionary power to grant an appropriate relief to the parties. The aim and object of the Industrial Disputes Act may be to impart social justice to the workman but the same by itself would not mean that irrespective of his conduct a workman would automatically be entitled to relief. The procedural laws like estoppel, waiver and acquiescence are equally applicable to the industrial proceedings. A person in certain situation may even be held to be bound by the doctrine of acceptance sub silentio."*

*"14. ... Direction for reinstatement does not automatically entitle an employee to full back wages. In Hindustan Tin Works (P) Ltd. v. Employees a three-Judge Bench of this Court laid down: (SCC p. 86, para 11)*

> *'11. In the very nature of things there cannot be a straitjacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the fact of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular (see Susannah Sharp v. Wakefield, AC at p. 179).'"*

*"16. We have referred to certain decisions of this Court to highlight that earlier in the event of an order of dismissal*

*being set aside, reinstatement with full back wages was the usual result. But now with the passage of time, it has come to be realised that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period that was spent unproductively, while the workman is being compelled to go back to a situation which prevailed many years ago when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may be arrived at.".*

6. This judgment in Allahabad Jal Sansthan's case was referred to in U.P. State Brassware Corpn. Ltd. and another v. Uday Narain Pandey, reported at (2006) 1 SCC 479, where the Court was considering case of a person employed on a "Project Peetal Basti" from 23-7-1984 to 8-1-1987 and whose services were terminated on the expiry of the tenure. The Labour Court ordered reinstatement holding that the employee had worked more than 240 days in the preceding calendar years and also granted full back wages. A writ petition before the High Court came to be dismissed and, therefore, the employer approached the Apex Court. It was urged before the Apex Court that payment of back wages is automatic upon a declaration that the order of termination is

unsustainable. In paras 17, 18, 22, 31, 32, 36, 42 and 43 of the judgment, the Apex Court observed as under :

> *"17. Before adverting to the decisions relied upon by the learned counsel for the parties, we may observe that although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result but now, with the passage of time, a pragmatic view of the matter is being taken by the court realising that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched."*
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> *"18. It is not disputed that the respondent did not plead that he after his purported retrenchment was wholly unemployed."*
>
> *"22. No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the*

*provisions of Section 6-N of the U.P. Industrial Disputes Act."*

*"31. In Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court this Court refused to go into the question as to whether termination of services of a workman in violation of the provisions of Section 25-F is void ab initio or merely invalid or inoperative on the premise that semantic luxuries are misplaced in the interpretation of "bread and butter" statutes. In that context, Chinnappa Reddy, J. observed: (SCC p. 447, para 6)*

> *"Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it msut ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders. The court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often not, comparatively far greater hardship is certain to be caused to the workmen*

*if the relief is denied than to the employer if the relief is granted."*

*"32. Yet again, no law in absolute terms had been laid down therein. The Court proceeded on the basis that there may be situations where grant of full back wages would be inequitable. In the fact situation obtaining therein, the Court, however was of the opinion that there was no impediment in the way of awarding the relief. It is interesting to note that Pathak, J., as His Lordship then was, however was of the view: (SCC p. 450, para 13)*

> *"Ordinarily, a workman who has been retrenched in contravention of the law is entitled to reinstatement with full back wages and that principle yields only where the justice of the case in the light of the particular facts indicates the desirability of a different relief."*

*The expression "ordinarily" must be understood given its due meaning. A useful reference in this behalf may be made to a four-Judge Bench decision of this Court in Jasbhai Motibhai Desai v. Roshan Kumar wherein it has been held: (SCC p. 682, para 35)*

> *"35. The expression 'ordinarily' indicates that this is not a cast-iron rule. It is flexible enough to take in those cases where the applicant has been prejudicially affected by an act or omission of an authority, even though he has no proprietary or even a fiduciary interest in the*

*subject-matter. That apart, in exceptional cases even a stranger or a person who was not a party to the proceedings before the authority, but has a substantial and genuine interest in the subject-matter of the proceedings will be covered by this rule. The principles enunciated in the English cases noticed above, are not inconsistent with it."*

*"36. The decisions of this Court strongly relied upon by Mr Sangal, therefore, do not speak in one voice that the Industrial Court or for that matter the High Court or this Court would have any discretionary role to play in the matter of moulding the relief. If a judgment is rendered merely having regard to the fact situation obtaining therein, the same, in our opinion, could not be a declaration of law within the meaning of Article 141 of the Constitution."*

*"42. A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance."*

*"43. The changes brought about by the subsequent decisions of this Court, probably having regard to the changes in the policy decisions of the Government in the wake of prevailing market economy, globalisation, privatisation and outsourcing, is evident."*

In para 52 of the judgment, the Court quoted, with approval, paras 6 and 16 from Allahabad Jal Sansthan v. Daya Shankar Rai and another, reported at (2005) 5 SCC 124, which have already been quoted in para 5 above. In para 61 of the judgment, the Court referred to the requirement of raising a plea and proof that the employee was not gainfully employed during the period of termination. The Court then set aside the judgments of the Labour Court and the High Court and directed payment of only 25 per cent back wages.

7. The latest judgment in J.K. Synthetics Ltd. v. K.P. Agrawal and another, reported at (2007) 2 SCC 433, on which the learned AGP for the petitioners placed reliance, refers to all these earlier judgments. In that case, the employee had been issued charge-sheets, an enquiry was held, and the employer imposed punishment of dismissal. Eventually, the Labour Court held that the enquiry was not fair and proper and reduced the punishment to stoppage of two increments by an award dated 27-4-1983. In subsequent proceedings, the Judge, Labour Court, directed payment of full back wages for the period of unemployment. This award and amendment thereto was challenged before the High Court, which

dismissed the petition. One of the questions, which was raised before the Supreme Court, was as under :

> *"3(ii) When the punishment of dismissal is substituted by a lesser punishment (stoppage of increments for two years), and consequently, the employee is directed to be reinstated, whether the employee is entitled to back wages from the date of termination to the date of reinstatement."*

On this question, after taking into consideration several earlier judgments, the Court observed as under in paras 15, 16, 17, 18 and 20 :

> *"15. But the manner in which "back wages" is viewed, has undergone a significant change in the last two decades. They are no longer considered to be an automatic or natural consequence of reinstatement. We may refer to the latest of a series of decisions on this question. In U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey, this Court following Allahabad Jal Sansthan v. Daya Shankar Rai and Kendriya Vidyalaya Sangathan v. S.C. Sharma held as follows: (Uday Narain Pandey case, SCC p. 480d-g)*

The Court then quoted passages from these judgments which have already been reproduced in earlier part of this judgment. The Court

further held :

> *"In G.M., Haryana Roadways v. Rudhan Singh this Court observed: (SCC p. 596, para 8)*
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> > *"8. There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualifications required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year."*

*"16. There has also been a noticeable shift in placing the burden of proof in regard to back wages. In Kendriya Vidyalaya Sangathan this Court held: (SCC p. 366, para 16)*

> *" When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard."*

*In U.P. State Brassware Corpn. Ltd. this Court observed: (SCC p. 495, para 61)*

> *"61. It is not in dispute that the respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman."*

*"17. There is also a misconception that whenever reinstatement is directed, "continuity of service" and "consequential benefits" should follow, as a matter of course. The disastrous effect of granting several promotions as a "consequential benefit" to a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and*

*functions of promotional posts, is seldom visualised while granting consequential benefits automatically. Whenever courts or tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether "continuity of service" and/or "consequential benefits" should also be directed. We may in this behalf refer to the decisions of this Court in A.P. SRTC v. S. Narsagoud, A.P. SRTC v. Abdul Kareem and Rajasthan SRTC v. Shyam Bihari Lal Gupta."*

*"18. Coming back to back wages, even if the court finds it necessary to award back wages, the question will be whether back wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages in addition to the several factors mentioned in Rudhan Singh and Uday Narain Pandey. Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and tht he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or*

*secure alternative employment. Be that as it may."*

*"19. But the cases referred to above, where back wages were awarded, related to termination/retrenchment which were held to be illegal and invalid for non-compliance with statutory requirements or related to cases where the Court found that the termination was motivated or amounted to victimisation. The decisions relating to back wages payable on illegal retrenchment or termination may have no application to the case like the present one, where the termination (dismissal or removal or compulsory retirement) is by way of punishment for misconduct in a departmental inquiry, and the court confirms the finding regarding misconduct, but only interferes with the punishment being of the view that it is excessive, and awards a lesser punishment, resulting in the reinstatement of employee. Where the power under Article 226 or Section 11-A of the Industrial Disputes Act (or any other similar provision) is exercised by any court to interfere with the punishment on the ground that it is excessive and the employee deserves a lesser punishment, and a consequential direction is issued for reinstatement, the court is not holding that the employer was in the wrong or that the dismissal was illegal and invalid. The court is merely exercising its discretion to award a lesser punishment. Till such power is exercised, the dismissal is valid and in force. When the punishment is reduced by a court as being excessive, there can be either a direction for*

*reinstatement or a direction for a nominal lump sum compensation. And if reinstatement is directed, it can be effective either prospectively from the date of such substitution of punishment (in which event, there is no continuity of service) or retrospectively, from the date on which the penalty of termination was imposed (in which event, there can be a consequential direction relating to continuity of service).What requires to be noted in cases where finding of misconduct is affirmed and only the punishment is interfered with (as contrasted from cases where termination is held to be illegal or void) is that there is no automatic reinstatement; and if reinstatement is directed, it is not automatically with retrospective effect from the date of termination. Therefore, where reinstatement is a consequence of imposition of a lesser punishment, neither back wages nor continuity of service nor consequential benefits, follow as a natural or necessary consequence of such reinstatement. In cases where the misconduct is held to be proved, and reinstatement is itself a consequential benefit arising from imposition of a lesser punishment, award of back wages for the period when the employee has not worked, may amount to rewarding the delinquent employee and punishing the employer for taking action for the misconduct committed by the employee. That should be avoided. Similarly, in such cases, even where continuity of service is directed, it should only be for purposes of pensionary/retirement benefits, and not for other*

*benefits like increment, promotions, etc."*

*"20. But there are two exceptions. The first is where the court sets aside the termination as a consequence of employee being exonerated or being found not guilty of the misconduct. Second is where the court reaches a conclusion that the inquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimise him, and the disproportionately excessive punishment is a result of such scheme or intention. In such cases, the principles relating to back wages, etc. will be the same as those applied in the cases of an illegal termination."*

8. The learned Advocate appearing for the respondent-employee submitted that these decisions in fact support the respondent's cause. He submitted that para 20 of the judgment in J.K. Synthetics Ltd. v. K.P. Agrawal and another, reported at (2007) 2 SCC 433, categorically rules that when termination of an employee is set aside as a consequence of employee being exonerated, the requirement of pleading and proof in absence of gainful employment would not be insisted upon and in that case, the principles relating to back wages would apply.

9. The learned AGP, however, submitted that the law as laid down

by the Apex Court in decisions referred to above was clearly to the following effect :

(i) Though earlier in the event of an order of dismissal being set aside, reinstatement with full back wages was the usual result, with passage of time, having regard to the changes in policy decisions of the Government, globalisation, etc., changes have been brought about by subsequent decisions of the Supreme Court.

(ii) These changes entail that an employee being reinstated would have to plead and prove his entitlement to back wages, by showing among other things that he was not gainfully employed.

(iii) Since such a change in law is the result of pronouncements by the Apex Court it relates back to the time at which the enactment in question came up for interpretation/enunciation and cannot be prospective in application. Consequently, though respondent had filed complaint before the Labour Court on 29-5-1995, he cannot be exempted from requirement of pleading and proving his entitlement to back wages.

10. His learned adversary stoutly opposed these contentions and submitted that it was unfortunate that such unwarranted inferences were

drawn from the judgments cited. As I gathered, he wanted to submit that :

(i) Plain common sense dictate in judgment of the Apex Court in *Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court, [(1980) 4 SCC 443],* (quoted in para 31 of judgment in *U.P. State Brassware Corporation Ltd. and another v. Uday Narain Pandey, [2006) 1 SCC 479]*, and in *Hindustan Tin Works (P) Ltd. v. Employees, [1979) 2 SCC 80]*, has not been, (and could not have been) overruled in *U.P. State Brassware Corporation Ltd*. In *Hindustan Tin Works (P) Ltd.,* a three-Judge Bench of the Apex Court observed that ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed. Had the Bench deciding *U.P. State Brassware Corporation Ltd.* so intended, it would have referred the question to a larger Bench.

(ii) On the other hand, the Bench deciding *U.P. State Brassware Corporation Ltd.* has only explained that no law in absolute terms was laid down in *Surendra Kumar Verma* and that what was to ordinarily follow (namely, payment of back wages) would have to be restricted to ordinary situations, excluding exceptional cases or situations.

(iii) In para 36 of the judgment in *U.P. State Brassware*

*Corporation Ltd.*, while referring to judgments cited, the Court held that such pronouncements could not be declaration of law within the meaning of Article 141 of the Constitution. To support his contention that grant of back wages was held by the Apex Court to be discretionary in nature, he relied on observations in the next para 37 of the judgment, which reads as under :

> *"37. It is one thing to say that the court interprets a provision of a statute and lays down a law, but it is another thing to say that the courts although exercise plenary jurisdiction will have no discretionary power at all in the matter of moulding the relief or otherwise given any such reliefs, as the parties may be found to be entitled to in equity and justice. If that be so, the court's function as court of justice would be totally impaired. Discretionary jurisdiction in a court need not always be conferred by a statute."*

(iv) Given the pressure of docket explosion in which the Apex Court functions, it would be wholly unjust to read into para 43 of the judgment in *U.P. State Brassware Corporation Ltd*. that the Court held that law has changed due to change in policy decisions of the Government or factors like globalisation. He submitted that stray observations in a judgment could not be read in order to draw impermissible inferences, for, the Apex Court could not at all have held that law changes with policy of Government, unless it is either changed by legislation or the Court interprets any existing legal provision differently in the changed context.

(v) If indeed there was a change in law, it would be atrocious to non-suit a litigant for his failure to plead something which he could not have known to be necessary when he filed pleadings before such alleged change. Such pronouncements would, therefore, operate only prospectively.

11. I have carefully considered the rival contentions, in light -of the three decisions relied on by the learned Advocates. The plain common sense dictates that removal of an order terminating services must ordinarily lead to back wages too. This observation in *Surendra Kumar Verma's* case still holds

good. Recent pronouncements only emphasize the need to restrict such consequence to 'ordinary' situations. Subsequent pronouncements only remind Courts that the word 'ordinarily' used in para 6 in *Surendra Kumar Verma's* judgment must not be forgotten. There is no change in law, and there can be no question of change in law because of any executive policy decisions.

12. The arguments in this behalf expose the dangers of

picking up stray sentences or words from judgments to press a point convenient to the party. Initially, overlooking the importance of qualifier 'ordinarily' in granting back wages a trend set in where grant of back wages became an inflexible rule. Now while halting the trend, when the Apex Court merely highlights the significance of qualifier 'ordinarily' in judgments in the eighties, relying on stray sentences in judgments, it is projected as if there is a sea chance in law and that too on account of change in policies. It has always been a dilemma for Courts as to how to apply never changing principles of law to ever changing realities of life. Qualifiers like 'ordinarily' enable Courts to relate application of legal principles to spacial and time dimensions of life.

13. In para 6 in Allahabad Jal Sansthan, or in para 11 of Hindustan Tin Works, or it para 22 of U.P. State Brassware Corporation Ltd., it has been specifically held that law in absolute terms cannot be laid down and that there can be no straitjacket or precise formula in the matter of back wages, which rests in the discretion of the Courts. This discretion has to be exercised judiciously for reasons, which must be spelt out. Factors, which may weigh with the Court in considering grant of back wages, could be those enumerated in para 8 of G.M. Haryana Roadways v.

Rudhan Singh, [(2005) 5 SCC 591] (quoted in para 15 of *J.K. Synthetics Ltd*.).

14. While in view of the provisions of Section 106 of Evidence Act, it would be necessary for workman to plead that he was not gainfully employed, and initial burden to prove it would be on him, as observed in para 18 in *J.K. Synthetics Ltd*., first, there is no obligation on a terminated employee to search for, or secure, alternative employment and the moment he asserts on oath that he was not gainfully employed, burden will shift on the employer.

15. Where reinstatement is ordered because punishment is found to be excessive, full back wages need not be granted (para 19 of *J.K. Synthetics Ltd*.). But case of an employee, who is exonerated, is an exception to the above rule (para 20 of *J.K. Synthetics Ltd*.).

16. In matters before Industrial or Labour Courts, it may not be appropriate to strictly apply rules of pleadings. However, since the necessity to have a pleading has been stressed in recent judicial

pronouncements, should such an occasion arise, in a case initiated before these pronouncements, the party concerned must be given a chance to raise such a plea before non-suiting him for not complying with something which he could not have known.

17. Applying these principles to case at hand, it has to be held that :

(i) Claimof back wages cannot be outright rejected for want of pleading in complaint filed on 29-5-1995 – years before the need was spelt out in judicial pronouncements.

(ii) The respondent had denied in his deposition on 19-9-2000 that he was doing private job, thus discharging the burden on him. The employer had not tendered any evidence in rebuttal.

(iii) Respondent's termination itself was found unwarranted (and not that respondent was guilty or punishment was excessive). Therefore, his case fell under the 'exception' carved out in para 20 of judgment in *J.K. Synthetics Ltd.*

(iv) Even applying the factors enumerated in para 8 of judgment in *G.M. Haryana Roadways*, respondent cannot be held disentitled to back wages, since respondent was

not shown to have entered by back door or was a daily wager, or held a temporary or *ad hoc* appointment. He had put in seven years of service, when unjustly sacked.

18. In view of this, it cannot be said that the learned Member, Industrial Tribunal, was not justified in awarding full back wages to the respondent. Rather, it has to be positively held that the learned Member, Industrial Court, rightly held the respondent entitled to full back wages.

19. In view of the foregoing discussion, the petition is devoid of any merit and it is, therefore, dismissed.

**JUDGE**

**pdl**